SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

Comes now Frederick D. Dismuke, petitioner, and presents this, his petition, for a rehearing based upon the following grounds:

First. The cases of *Douglas* v. *Wallace*, 161 U. S. 346; *United States* v. *McDonald*, 72 Fed. 898, 900; *Powell* v. *United States*, 60 Fed. 687, and *Wintermute* v. *Smith*, 30 Fed. Cas. 17897, accepted by this Court as controlling, are not controlling and when carefully examined are not in point.

Second. It is believed that this Court overlooked the case of *United States* v. *Matthews*, 173 U. S. 381, and also the case of *Walker* v. *United States*, 139 Fed. 409, affirmed without opinion by the Fifth Circuit Court of Appeals in 148 Fed. 1022.

Third. When the question, whether a field deputy marshal from 1895 to 1902 was an employee of the United States, is decided free from supposedly controlling decisions and when it is decided in accordance with the opinion of this Court in the case of *United States* v. *Matthews*, 173 U. S. 381, it must be decided in the affirmative.

FIRST.

The cases relied upon by the Government and considered by this Court as controlling are not in point.

Petitioner is frank to state that he did not anticipate that there was any danger of this Court's deciding against him upon his contention that he was an employee of the United States within the meaning of the Civil Service Retirement Legislation, and he apprehends that he did not brief that question as carefully for this Court as he should have. His overconfidence on this point is attributable to the fact that he had no difficulty on that question in the trial Court and he was convinced that the Court of Appeals agreed with him on that question because, if it had not, it probably would not have based its decision upon the more involved question of administrative law. It seems perfectly plain to petitioner that the four cases relied upon by the government and considered by this Court as controlling upon this question are easily distinguishable from the instant case. Petitioner is probably somewhat at fault in not distinguishing these four cases as thoroughly as he might have in his original brief. He was not sure, of course, whether this Court would pass upon that question, inasmuch as the Court of Appeals failed to pass upon it, or would send the case back to the Court of Appeals for a decision upon that question. Petitioner asks the indulgence of the Court while he now undertakes to

point out more clearly the clear distinction between the four cases above referred to and the instant case.

Petitioner asks for a rehearing upon the ground that this Court considered *Douglas* v. *Wallace*, 161 U. S. 346, as controlling upon the instant case and considered *United States* v. *McDonald*, 72 Fed. 898, 900; *Powell* v. *United States*, 60 Fed. 687, and *Wintermute* v. *Smith*, [illegible]0 Fed. Cas. 17897 as being to the same effect when petitioner thinks that he can demonstrate that none of these cases are controlling.

All that was decided in the case of *Douglas* v. *Wallace*, 161 U. S. 346, is that a deputy marshal does not have a claim against the United States for his portion of the fees earned, but has a claim against the marshal personally. That means simply that the deputy could not maintain a suit against the United States for his portion of the fees. That is entirely different from holding that the relation of master and servant, or employer and employee, does not exist between the United States and the deputy. All that was said in the opinion of the Court in the *Douglas* case, in addition to the holding above mentioned, was mere dictum. This Court in that case did not say and was not called upon to say whether or not the deputy marshal was an employee of the United States. The furthest the Court went in that direction was to say that the deputy's claims for services against the marshal "stand upon the same footing as those of an ordinary employee against his employer." That is a far cry from saying that the deputy is not an employee of the United States.

This Court has held that the relation of master and servant does not depend upon who pays the servant. In the case of *Standard Oil Company* v. *Anderson*, 212 U. S. 215, the Court says,

> "In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon.

> They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

In the same case this Court said:

> "It is insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become, for the time being, with respect to the work negligently performed, the servant of the master stevedore. This may be true, although the winchman was selected, employed, paid, and could be discharged by the defendant."

The real test as to when the relation exists was expressed by this Court in the leading case of *The Singer Manufacturing Company* v. *Rahn,* 132 U. S. 518, as follows:

> "And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' " The rule is stated in 18 Ruling Case Law, Page 490 as follows:
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> "The relation, whatever term may be used to describe it, exists, it ordinarily is said, whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done. The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist. Again, the manner in which payment is made may under some circumstances be decisive of the question, but this is not an invariable criterion by any means."

The case of *Employers Indemnity Company of Philadelphia* v. *Kelly Coal Company* (Ky.), 149 S. W. 992, is to

the same effect as the authorities above cited and recognizes specifically that the mode of payment is not decisive in determining whether the relation of master and servant exists.

To show how perfectly patent it is that this Court never intended in the *Douglas* v. *Wallace* case to hold that the deputy is not an employee or an officer of the United States and did not intend to fix the relation existing between the deputy and the United States, we cite the opinion in the case of *United States* v. *Matthews,* 173 U. S. 381, which was decided by this Court three years after the *Douglas* case was decided. In the *Matthews* case, the Attorney General, acting pursuant to an Act of Congress, offered a reward of $500.00 for the arrest of Asa McNeil. Matthews and Gunn, one a regular and the other a specially appointed deputy marshal, made the arrest and sued for the reward. The question arose as to whether a deputy marshal was prevented from recovering the reward by reason of the general statutory provision forbidding

> "officers in any branch of the public service or any other person whose salary, pay, or emoluments are fixed by law or regulations," from receiving "any additional pay, extra allowance or compensation in any form whatever" (Rev. Stat. 1765), and because of the further provision "that no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law * * *."

Mr. Justice White delivering the opinion said it was

> "unnecessary to determine whether a deputy marshal is an officer of the United States within the meaning of Section 1765 of the Revised Statutes and section 3 of the Act of June 20, 1874 * * *."

Moreover, in a concurring opinion in the *Matthews* case, Mr. Justice Brown who wrote the opinion in the *Douglas* v. *Wallace* case had this to say,

> "While I think *a deputy marshal is beyond all peradventure an officer of the United States,* yet as his compensation is by fees not paid *directly* by the government, but by agreement with the marshal, subject only to the limitation that such fees 'shall not exceed three fourths of the fees and emoluments received or payable' to the marshal 'for services rendered by him' (such deputy), I think it a grave question whether he is within the spirit of either of the sections above quoted. I consider it a reasonable construction to hold that these sections are limited to those who receive a salary or other compensation directly from the government, or one of its departments, and doubt their application to one who, although *holding a permanent appointment as an officer,* receives no pay directly from the government, but only such compensation as his superior may choose to allow him. (*Douglas* v. *Wallace,* 161 U. S. 246)." (Italics ours.)

It is clear, therefore, that this Court in the case of *Douglas* v. *Wallace* did not intend to say that a deputy marshal is not an officer of the United States because Mr. Justice Brown who wrote that decision, only three years later, stated that "beyond all peradventure" a deputy marshal is "an officer of the United States" and cited the *Douglas* v. *Wallace* case as an authority for that statement. The truth is that the question in the instant case was not even remotely before the court when *Douglas* v. *Wallace* was decided.

It does not answer the question under consideration to say that the deputy was an employee of the marshal. The opinion of the Court in the instant case takes for granted

that the deputy marshal must be an employee of the government *or* of the marshal. The Court's statement is as follows:

> "We regard the question whether such a field deputy marshal was an employee of the government or of the marshal as settled by the decision and reasoning of this Court in *Douglas* v. *Wallace,* 161 U. S. 346 * * *."

We submit that for certain purposes the deputy can be an employee or an appointee of the marshal and at the same time be an employee of the government. Of course, it has never been held by this Court that the deputy is an *employee* of the marshal. *Douglas* v. *Wallace* held only that the deputy's claims for service against the marshal "stand upon the same footing as those of an ordinary employee against his employer." Take that opinion written by Mr. Justice Brown together with the concurring opinion in the case of *United States* v. *Matthews,* also written by Mr. Justice Brown, to the effect that the deputy is "beyond all peradventure an officer of the United States," and we have this situation: The deputy marshal is an officer of the United States who must look only to the marshal for his pay. That is not an anomalous situation. The opinion of this Court in the case of *Standard Oil Company* v. *Anderson,* 212 U. S. 215, cited above, recognizes the law to be that the relation of master and servant may exist between two persons although the servant must look to a third person for his pay. The Biblical injunction that a man cannot serve two masters does not apply.

> "A substitute employed by a servant, in accordance with a custom permitting such hiring, or with the implied knowledge of the master or his subsequent ratification, is entitled to the same protection as the servant, and is bound by the terms and conditions of his predecessors contract, and the fact that the employee *receives his own regular wages* does not affect the rela-

tion of the substitute to the master. 39 C. J., page 38 Sec. 9. (Italics ours.)

"The rule is well settled that a person who is procured by an employee to act as his substitute or to assist him in his duties, the employer assenting to the arrangement, occupies the position of an employee, and that the duty owed him by the employer is the same as that owed to other employees. *And it does not make any difference that the substitute or assistant is promised no compensation for his services.*" 18 Ruling Case Law 577, Sec. 83. (Italics ours.)

The same principle, that a substitute engaged by a regular employee, with the implied approval of the employer, becomes the latter's employee, is recognized by the opinion delivered by Mr. Justice Sutherland in the case of *Baltimore & Ohio Southwestern Railroad Company* v. *Lula Burtch,* 263 U. S. 540. The relevant portion of the decision is as follows:

"There is a preliminary dispute as to whether Burtch stood in the relation of employee at the time of the injury, and this we first consider. The testimony shows that Burtch was not regularly employed, but that he engaged in this particular work at the request of the train conductor, because it was necessary to unload the cutter, and the train crew was unable to do so without help. The evidence tends to show that the conductor, in making the request, followed a longstanding practice to call upon bystanders to assist in unloading heavy freight. These facts, either undisputed or established by the verdict of the jury under appropriate instructions, are ample to sustain the conclusion reached below that there was an exigency which authorized the conductor to employ outside assistance, and that Burtch, for the time being, occupied the relation of employee to the company."

In the case of *Charles Derr Construction Company* v. *Gelruth* (Oklahoma), 120 Pac. 253, it was held that

> "The relation of master and servant existed between the employees of said construction company and the City of Shawnee."

When Mr. Justice Brown in the case of *United States* v. *Matthews* says that the deputy marshal is an officer of the United States, we take it that such statement is, at least, equivalent to saying that he is an employee of the United States on the theory that the greater includes the lesser. The distinction between an officer and an employee is pointed out in the case of *Throop* v. *Langdon*, 40 Mich. 673, as follows:

> "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public officer for misfeasance or nonfeasance in office, usually, though not necessarily, in the tenure of his position."

This Court is the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, in an opinion by Mr. Justice Stone, defined the terms "office" and "officer" as follows:

> "An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties and its compensation. * * * The term 'officer' is one inseparably connected with an office."

In the *Twenty Per Cent* cases, 13 Wall. 577, 578, this Court construed an Act of Congress giving additional compensation to certain employees of the government in the civil service in the City of Washington. In one of the cases, *United States* v. *Miller*, 13 Wall. 577, the question arose as to whether the foreman of carpenters working on

the Capitol Extension was an employee of the government so as to become a beneficiary under the Act. The Court said:

> "Employed, as he was, by the authority of the Secretary of the Interior, it is clear that he was an employee in the civil service in that department, as neither a commission nor a warrant of appointment is required to evidence such an employment."

In the case of *United States* v. *Manning,* 80 U. S. 577, the claimant was a watchman or a guard at the jail. This Court pointed out that as the office of warden was created by law and the warden selected the guards at the jail "unquestionably, guards of the jail are employees of the warden, and the office of warden of the jail is a bureau of division of the Department of the Interior." The significance of that case, as we understand it, lies in the fact that although the benefits of the Act were for "employees of the government" and this Court decided that the claimant was an "employee(s) of the warden," nevertheless, he was entitled to the benefits of the Act as an employee of the government.

In the next of the *Twenty Per Cent* Cases, 13 Wall. 568, there were eight claimants. This Court said:

> "Persons so employed are properly in the service if they were employed by the head of the department or of the bureau or any division of the department charged with that duty and authorized to make such contracts and fix the compensation of the person employed, even though the particular employment may not be designated in an appropriation Act."

Of course, the United States is a corporation sovereign. It can act only through agents. All officers and employees of the United States must of necessity be selected or appointed by some other representative of the government.

The more important officers are appointed by the President with the advice and consent of the Senate. Some of the lesser important officers are appointed by other representatives of the government. Sec. 780 of the Revised Statutes specifically authorized the marshal to "appoint" one or more deputy marshals. The idea of "appointing" him carries with it the idea of naming him to a public office. This is borne out by the requirement that he take an oath of office that he will properly "perform the duties of the office of marshal (or marshal's deputy, as the case may be)." R. S. 782. The power of appointment had to be vested somewhere. With reference to Assistant United States Attorneys, it is vested in the Attorney General; with reference to deputy marshals, it was vested in the marshal. Both are none the less public officers and employees of the United States.

Let us suppose a private corporation with its principal office and place of business is in Washington, D. C. It has a branch office in Macon, Georgia. It has in charge of that branch office a manager. It appropriates for the salaries of the branch office $500.00 a month and authorizes the manager to select an assistant and to make any agreement which he desires to make with that assistant as to the portion of the $500.00 the assistant is to receive for his services, provided always that the assistant shall not get more than a certain percentage of it. The assistant is appointed solely to assist the manager in conducting the affairs of the corporation, and the corporation from Washington issues detailed instructions as to what the duties of the manager and the assistant manager shall be and as to the manner in which these duties shall be performed. Let us say that the corporation goes further and says to the assistant that he must look solely to the branch manager for his remuneration. Let us suppose further that the corporation gives to the manager the right to dispense with the assistant's serv-

ices at any time he wants to, the corporation reserving the right similarly to dispense with the assistant's services any time it wants to and to reduce the assistant's pay any time it so desires. Can there be any doubt under the law that this assistant manager is an employee of the corporation?

We must remember that it was the United States which authorized the marshal to appoint the deputy; it was the United States which prescribed, by an Act of Congress, the oath of office which the deputy must take; it was the United States which provided, by an Act of Congress, the amount of fees payable to the marshal or the deputy and the maximum proportion of those fees which the deputy could receive, and reserved the right to the Attorney General to reduce that maximum percentage of the fees, receivable by the deputy "whenever the returns show such rate to be unreasonable" R. S. Sec. 841. We must remember also that even before the Act of May 28, 1896 the deputy was removable from office by the District Judge or by the Circuit Court R. S. Sec. 780. Of course, if the deputy were merely a personal and private employee of the marshal, the government, through the agency of the District or Circuit Court, would have no right to remove him, nor would the Attorney General have the right which he did have under Section 841 R. S. to reduce the deputy's income regardless of any agreement which the marshal might have made with him. We must remember also that according to the testimony of George F. White (R. 42), after the marshal appointed his deputy he had to make a report to the Attorney General and that "if he (the Attorney General) approved it, they stayed on; if he didn't, they went off." There is nothing in the record contrary to that testimony and this witness had knowledge of the facts because he was appointed a deputy marshal himself in 1889 (R. 40) and later became marshal in 1903 (R. 40). From his testimony, it seems that the deputy's appointment had to be approved

by the Attorney General before he had any status as a deputy marshal.

A case very much in point is *Walker* v. *United States*, 139 Fed. 409, decided in the Middle District of Alabama by District Judge Jones and affirmed without opinion by the Fifth Circuit Court of Appeals in 148 Fed. 1022. The Court said:

> "The law did not contemplate that the marshal could discharge his important duties without help, and therefore created the office of deputy marshal. It did not contemplate that either of these officers should perform *public services* without remuneration, and consequently made proper provision therefor. * * * In the matter of his compensation, the deputy marshal, *although a public officer performing public services*, occupied the anomalous position of a stranger to the government. *Douglas* v. *Wallace*, 161 U. S. 349. Nevertheless the law bound the marshal to include the fees earned by his deputies in his accounts, and to collect them from the government, in order that he might not retain more than the maximum compensation allowed by law, and that he might have a fund out of which to pay his deputies for their services. * * * The government knew, when the money was paid to Walker, that the greater part of it would be immediately paid out to others, *who in fact, whatever may be the legal theory, had rendered services to the government, to pay for which this very money was paid to him.*" (Italics ours.)

Later in the same opinion, the Court, with reference to the money received by the marshal and paid out to the deputy, uses this language,

> "and as to which, *whatever may have been his technical relations, he was in fact and in morals only a conduit* to pass the money to the persons *to whom it belonged.*" (Italics ours.)

We venture the hope that we have successfully demonstrated that the decision in the case of *Douglas* v. *Wallace* is not at all controlling upon the question now before the Court and that, in fact, the decision in that case does not indicate anything one way or the other as to whether the deputy marshal is, within the meaning of the Retirement Legislation, an employee of the United States. We venture the hope also that under the record in this case showing how the deputy was appointed, how completely he was controlled by the United States, how he served the United States, and the United States only, continuously as a deputy marshal for a period of more than six years, this Court will be convinced that he was during such period, in truth and in fact, an employee of the United States for all purposes except for the purpose of maintaining a suit against the government for his remuneration and particularly within the meaning of the Civil Service Retirement Legislation which, no doubt, had as its purpose the granting of retirement benefits to all of those people who served and worked for the government for the prescribed periods, regardless of whether, technically, they were employees or not. We are sustained in this hope by the fact that statutes of this type are to be liberally construed in order to confer the benefits which Congress intended. *Walton* v. *Cotton*, 19 How. 355.

It remains only to show that the cases of *United States* v. *McDonald*, 72 Fed. 898, *Powell* v. *United States*, 60 Fed. 687, and *Wintermute* v. *Smith*, 30 Fed. Cas. 17897, are not controlling. We agree with what this Court said in its opinion in the instant case that the three cases referred to are to the same effect as the case of *Douglas* v. *Wallace*, 161 U. S. 346. Each of these cases deals only with the question whether the government employee in each of the cases had a right to sue the government for his remunera-

tion or had to look to someone else for the same. The plaintiff in the *Powell* case was a deputy marshal. The Court said:

> "In contemplation of the law, there can be no severance or division of interest in the fees between the marshal and his deputies for which each can severally make claim."

In the *McDonald* case the suit was filed by a lawyer who had been appointed by a District Attorney ostensibly as a clerk but to assist him in the duties of his office. The Attorney General had authorized such appointment "on condition that the appointee should look solely to the District Attorney for his compensation which was to be paid out of the emoluments of the office." We submit that McDonald could not sue the government, not necessarily because he was not an employee of the government, but because his contract provided explicitly that he should look solely to the District Attorney for his compensation. They did not decide that McDonald was not an employee of the government. The Court which decided the *McDonald* case did not have to decide that question. Whether or not McDonald was an employee of the United States might depend upon facts which we do not know. We rather think that if he had worked for the United States as long, as continuously, and as exclusively as Mr. Dismuke did, and if he was as completely subject to the control of the United States through the Attorney General as Mr. Dismuke was, both as to the reduction of his income whenever the Attorney General so desired and as to the termination of his employment whenever the government so desired (through the District or Circuit Court prior to May 28, 1896, and through the Attorney General subsequent thereto, Sec. 841, R. S.), he should be considered as an employee of the United States. He would not be as clearly entitled to be so con-

sidered as is Mr. Dismuke because Mr. Dismuke's office as a deputy marshal was created by law, his oath of office prescribed by law, and his every duty commanded by Congressional enactments supplemented by the Attorney General's instructions.

The case of *Wintermute v. Smith,* 30 Fed. Cas. 17897, involved a motion to retax the costs. The costs, including the deputy marshal's fees, had been taxed against the plaintiff. There had been, however, full settlement of the marshal's fees by the plaintiff who held receipts for the payment of them, embracing a release from all further liability to the marshal for his fees. The Court held that the marshal's receipt must operate as a discharge of the plaintiff so far as the marshal's fees were concerned and that the deputy's remedy for compensation for his services was against the marshal.

In its opinion in the instant case, this Court relies upon the administrative ruling in the Claim of George Taylor Larkin, decided by the Secretary of Interior on October 4, 1920, and upon the principle that a construction of such long standing by administrative officials is not lightly to be overturned. We wish to point out that the Secretary's decision in the Claim of George Taylor Larkin *was not actually based upon the view that the deputy marshal was not an employee of the government.* It is true that the Secretary expressed this view, but such expression was made after he had already definitely decided the claim against the deputy marshal on an entirely different ground. As proof of this statement, we wish to cite the two concluding paragraphs in that opinion.

> "I therefore conclude that the act does not apply to employees whose separation from the service occurred prior to August 21, 1920, when the annuity provisions of the act became effective. Hence, *for that reason*

alone, this claimant has no annuitable status. (Italics ours.)

"Furthermore, he does not show that he was in the employ of the United States for a period of 15 years. His claim for service as assistant marshal, evidently intended as deputy marshal, can not be recognized, as it has been held that, under the law and procedure in force during the period covered by this claim, deputy marshals were employed by the marshal and not by the United States. *Powell* v. *United States*, 60 Fed. Rep. 687; *Douglas* v. *Wallace*, 161 U. S. 346; 3 Comptroller's Decisions, 648."

Furthermore, George Taylor Larkin, as will be seen from the opinion above quoted, referred to himself "as assistant marshal." From that we do not know what he was. Probably, he did not take the oath of office. He might have been a kind of bailiff and very probably he did not devote all of his time to his governmental duties because the Secretary's opinion shows that he made about $600.00 yearly as "assistant" marshal.

We wish to emphasize that apparently this conception of a deputy marshal as a purely personal employee of the marshal rather than as an employee of the United States had its inception in an unnecessary and baseless *obiter dictum* by the Secretary of the Interior. Since such statement on the part of the Secretary was not necessary to his decision, and since what this Court held in the *Douglas* v. *Wallace* case and what the lower courts held in the *McDonald, Powell and Wintermute* cases, is beside the point, we earnestly insist that this is the proper time to explode an erroneous administrative *dictum* before it finds lodgment in the decisions of the highest court in the land.

The opinion in the instant case cites several decisions of this Court for the proposition that an administrative construction of such long standing is not lightly to be over-

turned. These cases recognize that such construction ought not to be overruled "without cogent reasons"; (*United States v. Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627); "except for weighty reasons" (*Fawcus Machine Company* v. *United States,* 282 U. S. 375, 378; *Brewster* v. *Gage,* 280 U. S. 327, 336).

The case of *Interstate Commerce Commission* v. *New York, N. H. and H. R. Company,* 287 U. S. 178, recognizes only that long administrative practice has at least a "sanction of validity." The case of *Maynard* v. *Elliott,* 283 U. S. 273, deals with a construction of a section of the Bankruptcy Act, approved by both courts and text writers for about twenty-six years. The case of *Norwegian Nitrogen Products Company* v. *United States,* 288 U. S. 294, 315, holds that "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction" and that such practice, "consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."

How can we say that the Secretary's *dictum* in the *George Taylor Larkin* case has been "consistent and generally unchallenged" when it did not amount to anything in the first place because George Taylor Larkin had no claim, regardless of the *dictum* and it would have done him no good to refuse to acquiesce in the same? So far as we know, no person has ever acquiesced in this particular administrative *dictum.* So far as we know, no person has ever been denied his civil service annuity because of a ruling, administrative or judicial, that a field deputy marshal is not an employee of the United States.

Moreover, this Court in the case of *United States* v. *Tanner,* 147 U. S. 661, said:

> "It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

In that case the Court said also:

> "If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but as it is clear to us that this construction was erroneous, we think it is not too late to overrule it."

SECOND.

This Court must have overlooked the cases of United States v. Matthews. 173 U. S. 381; Walker v. United States, 139 Fed. 409, and also United States v. Tinklepaugh, 3 Blatchf. 425, 28 Fed. Cas., page 193, case No. 16,526.

From what has been said in the first division of this petition for rehearing, it is apparent that this Court overlooked the case of *United States* v. *Matthews*, 173 U. S. 381. It is true that in that case this Court did not decide specifically whether a deputy marshal is an officer of the United States, stating on the contrary that it was not necessary to decide that question. Nevertheless, Mr. Justice Brown, in a concurring opinion, he being the same Justice who wrote the opinion in the case of *Douglas* v. *Wallace*, said that "beyond all peradventure" a field deputy marshal was "an officer of the United States." Certainly, if the case of *United States* v. *Matthews* had not been overlooked by this Court, *Douglas* v. *Wallace* would not have been considered by the Court as settling our question. We say this because the author of the opinion in *Douglas* v. *Wallace* did not so consider it. He cited *Douglas* v. *Wallace* in his concurring opinion in the case of *United States* v. *Matthews*, 173 U. S. 381, 388.

From what has been said in the first division of this petition for rehearing, we think it is clear also that this Court should have the benefit of the decision in the case of *Walker* v. *United States*, 139 Fed. 409. It is true that our brief did

not contain that citation. That case is discussed in the first division of this petition, and we shall not go into it again. The logic and force of that opinion is, it seems to us, irresistible. The Court said that whatever the legal or technical theory may be, the deputy marshal really works for the government and when it collects the full amount of the fees from the government he is no more than a mere conduit through whom the deputy's share of the fees flows to its rightful owner. The Fifth Circuit Court of Appeals affirmed that case for the reasons assigned by the District Court, the memorandum opinion being found in 148 Fed. 1022.

We have also overlooked what is perhaps the oldest decision dealing with the status of the deputy marshal, *United States* v. *Tinklepaugh* (C. C. N. Y. 1856), Fed. Cas. No. 16,526. Section 5398 of the Revised Statutes, making it a crime to obstruct, resist or oppose any officer of the United States, had not been extended at that time so as to protect any person authorized to serve or execute any writs or process. The statute applied at that time only to officers of the United States. In the *Tinklepaugh* case, it was decided squarely that a deputy marshal of the United States is an officer of the United States within the meaning of that section. The contention was made in that case that the deputy was a mere agent or servant of the marshal and was not, within the meaning of the law, an officer of the United States. The Court repudiated that contention and since the opinion in that case shows so convincingly the reasoning upon which it is based, we take the liberty of quoting from it.

> "The question, then, is—were Ryer and Horton officers of the United States, authorized to serve the warrant? They were deputies of the marshal. It is so charged in the indictment. As such deputies, they were authorized to serve the warrant without any special

appointment. But it is said that, although they may have been authorized to execute the warrant, they were merely agents or servants of the marshal, and were not, within the meaning of the law, officers of the United States. A little consideration of the laws of congress will show that a deputy marshal is an officer of the United States, authorized to serve process; and, if he be such officer, so authorized, resistance to him is prohibited by the act of congress in question. The marshal has power, as there shall be occasion, to appoint one or more deputies, who are removable from office by the judge of the district court or the circuit court sitting in the district, at the pleasure of either. Act Sept. 24, 1789 (1 Stat. 87), § 27. If a deputy marshal can be removed from office, he is an officer before he is so removed, for, he cannot be removed from office unless he is an officer; and, as he has power to serve process, he is an officer of the United States empowered to serve process. Upon the death of the marshal, his deputies continue in office, unless otherwise specially removed, until another marshal is appointed and sworn. Act Sept. 24, 1789 (1 Stat. 87), § 28. Every marshal or his deputy, when removed from office, has power notwithstanding his removal, to execute all such precepts, as are in his hands at the time of such removal. Id. Marshals and their deputies have the same powers, in executing the laws of the United States, that sheriffs and their deputies in the several states have, in executing the laws of the several states. Act Feb. 28, 1795, § 9 (1 Stat. 425). When a witness is material on the trial of a criminal case, a judge is authorized to issue a warrant, directed to the marshal or other officer authorized to execute criminal and civil process, to arrest such witness and carry him before such judge. Act. Aug. 8, 1846, § 7 (9 Stat. 74). These several laws show that deputy marshals are officers of the United States authorized to serve process. There may be persons who, in certain cases, are authorized to serve process, who may not be officers of the United States. In certain cases a private individual

> may serve process—as, when a marshal or his deputy is a party. In such cases, writs and precepts are to be directed to such indifferent persons as the court, or any justice or judge, may appoint. Act Sept. 24, 1789, § 28 (1 Stat. 87). This last provision also shows that congress deemed deputies of the marshal to be officers of the United States. Ryer and Horton, therefore, being, as charged in the indictment, deputies of the marshal, were officers of the United States, authorized to serve process, within the meaning of the act of congress in question."

The *Tinklepaugh* case was followed in the case of *United States* v. *Martin*, 17 Fed. 150 (District Court Oregon), the Court saying,

> "There is no question but that Morse (a deputy marshal) was 'an officer of the United States' within the purview of the statute * * *."

THIRD.

When the question whether a field deputy marshal from 1895 to 1902 was an employee of the United States is decided free from supposedly controlling authorities and in accordance with the decision of this Court in the case of the United States v. Matthews, it must be decided in the affirmative.

In determining whose employee the deputy marshal was, we take it that we need only to ascertain, as was said by Mr. Chief Justice Taft in the case of *Linstead* v. *C. & O. Railway Company*, 276 U. S. 28, "for whom he was working". We know of no better answer to that question than the answer contained in the case of *Walker* v. *United States*, 139 Fed. 409, and *United States* v. *Tinklepaugh*, Fed. Cas. No. 16526.

Mr. Chief Justice Taft in the *Linstead* case, *supra*, recognizes that such inquiry is not answered by ascertaining who pays the wages. He expresses it this way:

> "We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job."

This Court has recognized that a person can be the employee of another for the purpose of certain legislation, although probably not an employee for all purposes. In the case of *Hull* v. *Philadelphia & Reading Railway Company*, 252 U. S. 475, the question arose as to who the deceased's employer was at the time of his death, and the Court said:

> "• • • We think, from the whole case, that deceased remained for all purposes • • • certainly for the purposes of the act • • • an employee of the Western Maryland Company only."

In the case of *Fuller Company* v. *McCloskey*, 228 U. S. 194, the facts were as follows: The Fuller Company contracted with Hibbs to erect for him an office building. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The Elevator Company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employee of the Otis Company, who was paid and generally controlled by that company. After its installation the Fuller Company entered into an arrangement with the Elevator Company by which it became en-

titled to use this elevator in the prosecution of its work, paying to the Elevator Company $3.00 per day which was to cover the wages of the operator of the elevator, the Otis Company reserving the primary right to use the elevator. The Court held that the operator of the elevator was the servant of the Fuller Company. It seems, therefore, that although the operator of the elevator was employed by the Otis Company who *paid him* and generally controlled him, nevertheless he was at the same time an employee of the Fuller Company. That was the correct result because he was actually working for the Fuller Company, although, we submit, he *could not have sued* the Fuller Company for his wages, there being no privity of contract between the two.

The marshal cannot be considered as an independent contractor and the deputy as his employee. The position of the independent contractor and the question of when the employees of the independent contractor become the employees of the person desiring the work to be done is fully dealt with in the leading case, *Standard Oil Company* v. *Anderson*, 212 U. S. 215. This Court said in that case that the inquiry must be:

> "Whose is the work being performed, * * * a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work,"

That is the same case which holds that the payment of wages is not the ultimate fact but is only more or less useful in determining whose is the work and whose is the power of control.

While we do not think that the marshal can by any stretch of the imagination be looked upon as an independent contractor, nevertheless, if he did at the moment of the appointment of the deputy have such status the deputy immedi-

ately became the servant or employee of the United States by reason of the complete and thorough control it exercised.

"If, however, the employer retains or assumes control over the means and method by which the work of a contractor is to be done, the relation of master and servant exists between him and servants of such a contractor, and the mere fact of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ." 39 *C. J.*, Page 38.

"It is not necessary, to create the relation of master and servant, that the master shall directly employ the servant, or that the servant shall be directly responsible to the master, or that the master shall have authority to control his employment, fix his wages, or discharge him. When a person who undeniably occupies the relation of servant employs, with the consent and approval of the master, another to assist him in the performance of the duties he is discharging for the master, the relationship of master and servant is thereupon created between the master and the person so employed, although the person so employed may be compensated by and be under the immediate control of the person employing him. The master, by consenting to an arrangement like this, assumes to exercise towards the person so employed the duty that he owes to servants employed by himself. If the rule were otherwise, the master could, by conferring upon a servant the authority to employ, compensate, and control assistants, relieve himself of the ordinary duties imposed by law upon the master by the relation of master and servant." *Paducah Box & Basket Co.* v. *Parker*, 136 S. W. 1012. (Court of Appeals of Kentucky.)

Let us consider a few of the outstanding characteristics of the deputy marshal's status:

The power conferred upon the marshal to appoint the deputy comes from the government. (R. S. Sec.

780.) The very position itself is therefore created by the United States.

The marshal cannot retain the deputy as long as he wants to but the deputy is removable from office by a certain employee of the United States, namely, the District Court or the Circuit Court. (R. S. 780.)

With the passage of the Act of May 28, 1896, the United States, through the Attorney General, could discharge or remove the deputy at will. (28 U. S. C. A. 492.)

The instructions issued by the Attorney General after the passage of the Act of May 28, 1896, said, "Appointment of field deputy marshals other than as the public interest may require will be cancelled" (R. 32). (Petitioner served as a deputy marshal prior to the Act of May 28, 1896, only 5 months and 12 days, so that practically all of his service as a deputy marshal for 6 years, 4 months, and 14 days was under that Act.)

Under the testimony of Mr. George F. White, the appointment of the deputy had to be approved by the Attorney General, and if the Attorney General did not give his approval, the deputy "went off." (R. 42.)

Even before the Act of May 28, 1896, the United States prescribed the maximum amount which the marshal could agree for the deputy to receive and went further and reserved the right to reduce that amount "whenever the returns show such rate to be unreasonable." (R. S. 841.)

The United States required the deputy to take an oath of office. 28 U. S. C. A. 494. This requirement was the result of an act of Congress and not merely an instruction from the Attorney General.

The United States prescribed in minute detail both by legislation and by instructions from the Attorney General, the common superior of both the marshal and the deputy, exactly what duties were to be performed by each of them and in what manner they were to be performed (R. 24-39).

The Attorney General even told the deputy how to make out his vouchers (R. 29).

If the marshal died the deputy was required by statute to "continue in office, unless otherwise specially removed, and * * * execute the same in the name of the deceased, until another marshal is appointed * * *." (R. S. 789.) (Certainly the deputy would be an employee of the United States during such hold-over period.)

It was provided also that in certain instances an incoming marshal should make payments on account of services and expenses of his predecessor's deputies (R. 37). If the deputy were only a personal employee of the marshal, what interest would the United States have in paying such deputies?

As the Attorney General has correctly said in his book of instructions, "The compensation of a field deputy marshal for all his services * * * is paid by the United States" (R. 35).

As the Attorney General has also correctly said such compensation of the field deputy marshal is paid by the United States "in cases between individuals as well as in cases to which the United States are a party" (R. 35).

As was said by the District Court in the case of *Walker* v. *United States*, 139 Fed. 409, 416, with the approval of the Circuit Court of Appeals for the 5th

> Circuit, 148 F. 1022, the marshal in collecting the fees from the government and paying them over to the deputy "whatever may have been his technical relations, (he) was in fact and in morals only a conduit to pass the money to the persons to whom it belonged."

Since the United States authorized the deputy's appointment, could terminate that appointment at will, controlled the deputy's remuneration (with only a limited leeway to the marshal, and that leeway not absolute because the amount agreed upon by the marshal and deputy could always be reduced by the government when the returns showed the amount unreasonable (R. S. 841)) and since the United States controlled the deputy as to what he did and how he did it, how can it be said that he was not an employee of the United States? The power retained by the United States to discharge the deputy is utterly inconsistent with the deputy's being merely an employee of the marshal. The same is true as to the power retained by the United States to regulate the deputy's income.

Upon the oral argument of this case, the Court inquired whether it was not true that the deputy performed some services in connection with litigation between private citizens to which the government was not a party. The answer, of course, was in the affirmative. We submit, however, that it makes no difference. The Judge of the District Court of the United States likewise performs services in connection with private litigation but he is none the less an employee of the United States whether trying a railroad accident case or a criminal case. The District Court is a Court of the United States, an agency of the United States, created in accordance with the Charter of the Corporation Sovereign. Those who organized the United States Government deemed it advisable for it to have power to create United States Courts, and such Courts were created having jurisdiction to try certain types of private litigation. It is

a United States Court all the while and, in every case it tries, it is performing a function of and for the United States. Moreover, as the Attorney General has correctly said, the United States pays the field deputy marshal for his services "in cases between individuals as well as in cases to which the United States are a party" (R. 35).

Petitioner is so thoroughly convinced that he ought to win this case, it seems so clear to him that he was an employee of the United States, that he is afraid that he is overlooking some arguments that should be made. It seems to him that the finding of law made by the District Court is unanswerable, to-wit:

> "* * * The purpose and intention of Congress in enacting the statutes relating to the retirement of civil service employees was to provide an annuity for those who had been regularly engaged in working for the Government for the prescribed periods" (R. 11).

The beneficiaries of the retirement legislation did not have to be on the payroll of the United States, although petitioner thinks he would meet that requirement. The benefits of the Act were not confined to those who could maintain a salary suit against the United States. The Act as codified in Sec. 691 of Title 5 U. S. C. A., names as its beneficiaries "all employees in the classified civil service of the United States" * * *.

Petitioner certainly worked for the United States. It was government work which he did. He worked continuously and exclusively for the government in his capacity as an officer, a sworn officer, of the United States for more than 6 years. He took his orders from the government. He could have been fired by the government. His percentage of the fees could have been reduced by the government. He submits that he was an employee of the United States—at least within the meaning of the civil service retirement legislation.

Petitioner in this case is not begging. He is glad that this Court decided that it is not a pension which he seeks. He hesitates even to ask for a liberal construction of the civil service retirement legislation. He would not ask for it except that this Court has held, and the Courts generally hold, that he is entitled to it. Statutes of this type are liberally construed to carry out their beneficent purpose. "And where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress, it should be done." *Walton* v. *Cotton,* 19 How. 355; *O'Dea* v. *Cook,* 169 P. 366 (1), 176 Cal. 659; *Klench* v. *Stockton,* 249 P. 46 (Cal. Appeals). 43 C. J. 813, Sec. 1408.

Conclusion.

Petitioner for the reasons above stated respectfully urges that this petition for a rehearing be granted so that the question can be argued further, orally or by brief, as the Court shall determine, and that upon further consideration the judgment of the Circuit Court of Appeals be reversed and petitioner be declared entitled to the redress he seeks.

Respectfully submitted,

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The undersigned counsel for petitioner hereby certifies that the foregoing petition is presented in good faith and not for delay.

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